APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 26984
Summary Calendar

DEVELOPMENT CORPORATION OF AMERICA, INC.,
Plaintiff-Appellee,

versus

UNITED BONDING INSURANCE COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

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(June 25, 1969)

Before BROWN, Chief Judge, THORNBERRY and MORGAN, Circuit Judges.

BROWN, Chief Judge: In this Florida diversity case, Plaintiff Development Corporation of America [DCA], sued on a performance bond issued by United Bonding Insurance Company [United] to secure the performance of a contract entered by United's principal, International Electrical Contractors [International]. Shortly after the beginning of the trial before the District Judge, United

announced in open court that it had authority to settle the matter, and after a recess the parties stipulated to the amount of damages, if allowed, in favor of DCA and against United in the sum of $125,000. However, United did reserve the right to appeal from any prior rulings of the District Court.

Taking advantage of its reservation, United now makes essentially two arguments for reversal. First, it alleges error in the admission into evidence of a photographic copy of the bond in question on the ground that DCA had not made a proper and adequate foundation for this departure from the "best evidence" rule. Second, United argues that it was error to admit both the copy of the bond and the copy of a contract incorporated by reference into the bond, and to render judgment based upon these documents. Finding these contentions to be without merit, we affirm the judgment below.[1]

The facts of this case are simple and undisputed. But we need not set them out since the appeal rests wholly upon two technical objections to evidence.

We consider first the question whether the District Court erred in admitting into evidence, over objection, a photographic copy of the bond sued upon. United's objection is founded upon the best evidence rule, the rule of evidence that requires the contents of an available written document to be proved by introduction of the document itself.

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[1]Pursuant to new Rule 18 of the Rules of this Court, we have concluded on the merits that this case is of such character as not to justify oral argument and have directed the Clerk to place the case on the Summary Calendar and to notify the parties in writing. See Murphy v. Houma Well Service, 5 Cir., 1969, —— F.2d ——, Part I [No. 26902, slip opinion dated March 11, 1969].

There is nothing to this claim for two reasons. First, the sufficiency of the foundation laid for the admission of secondary evidence rests largely in the discretion of the Trial Court.[2] The determination of the Trial Judge on the admission of secondary evidence will not be distrubed in the absence of clear evidence of mistake amounting to an error of law. *Willhoit v. Commissioner*, 9 Cir., 1962, 308 F.2d 259. Second, and more important, United by formal answer to interrogatories admitted the genuineness (and authority of the executing agent) of the copy of the bond annexed to the complaint. That was enough. It was not an issue in the case, much less a matter for proof.[3]

This brings us to United's contention that the District Court erred in rendering judgment for DCA on the basis of the documents in evidence. The problem arises because the contract incorporated by the bond and described in the bond as dated August ____, 1964, was not in fact signed and dated until September 28, 1964. The facts reveal that DCA had conditioned the award of a contract on the acquisition by International of a performance bond. At the same time a form contract dated August 10, 1964, was drawn up and sent to International, but because of International's request for modifications, the contract was not signed until September 28. In the meantime, International had applied for a performance bond covering the August 10 contract, and the bond as issued by United contained an "erroneous" date of the contract to be bonded.[4]

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[2]*E.G.*, Probst v. Presbyterian Church, 1889, 129 U.S. 182, ____ S.Ct. ____, 32 L.Ed. 642; Western, Inc. v. United States, 8 Cir., 1956, 234 F.2d 211; Atchison, T. & S.F.Ry. v. Jackson, 8 Cir., 1956, 235 F.2d 390. See generally 29 Am.Jur.2d *Evidence* §§459-62 (1967).

[3]If there is any doubt as to delivery (which we doubt), there was ample credible testimony to prove delivery.

[4]The date was "erroneous" in that the date of "August ____" became "September 28." The cause of this mistake was evidently United's assumption that the contract would be both modified, as requested by International, and signed within the month of August 1964.

Nothing could be plainer, therefore, than that the contract dated September 28 was in fact the one intended to be bonded by the parties. The sworn answers to interrogatories show that United received the premiums for the bond, paid the agent the originating commission, and has never refunded a thin dime to the principal or anyone else. Under these circumstances we find unavailing the supertechnical and hoary principle that "a plea which sets up a contract different from and contradictory to the statements in the bond is bad and may be taken advantage of on demurrer. It is a common rule, well established, that in an action or a bond between the parties thereto, they are controlled by the recitals therein with reference to which the contract is made." *Booske v. Gulf Ice Co.*, Fla., 1888, 24 Fla. 550, 5 So. 247, 250. See also *Sewell v. Huffstetler*, Fla., 1922, 83 Fla., 629, 93 So. 162.

It is, of course, our duty as a Federal Court to decide this case according to Florida law. United contends that the Florida cases compel a decision in its favor, although it cites no case directly in point. We decline to believe, however, that the Florida Courts, if they were confronted with this case — arising as it does from the fast-moving, high-pressure world of big business today — would apply rigidly or mechanically an old rule, developed in a different context, that would completely frustrate the obvious intent of the parties, which was vouchsafed by that safeguard of the business world — the receipt and retention of the money bargained for.

Moreover, everything points this way in the more recent Florida decisions. For example, Florida has adopted the principle that contracts of a surety for hire are construed most strongly in favor of the obligee. *National*

Union Fire Ins. Co. v. Robuck, Fla. Dist. Ct. App., 1967, 203 So.2d 204, *cert. denied*, 209 So.2d 672, 212 So.2d 809; *Lambert v. Heaton*, Fla. Dist. Ct. App., 1961, 134 So.2d 536; *Phoenix Indem. Co. v. Board of Public Instruction*, Fla. Dist. Ct. App., 1959, 114 So.2d 478. Likewise, it is the rule in Florida that a departure from a construction contract will not automatically relieve and exonerate a surety. If, however, there is a departure that results in injury to the surety, the surety will be relieved and discharged to the extent of its injury. *Gibbs v. Hartford Accident & Indem. Co.*, Fla., 1952, 62 So.2d 599.

AFFIRMED.

CERTIFICATE OF SERVICE

I, ERIK J. BLOMQVIST, JR., one of the attorneys for UNITED BONDING INSURANCE COMPANY, Petitioner herein and a member of the Bar of the Supreme Court of the United States hereby certify that on the 8th day of September, 1969, I served a copy of the foregoing Petition for Certiorari on JAMES E. GLASS, of Rosenberg, Rosenberg, Reisman & Glass, attorneys for Respondent, DEVELOPMENT CORPORATION OF AMERICA, by mailing a copy in a duly addressed envelope, with first class postage prepaid to JAMES E. GLASS, ESQ., 1002 Ainsley Building, Miami, Florida 33132.

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